IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1746 OF 2005

M/s. Digital Leasing & Finance Ltd. ...Petitioner
Vs.
Shri. Diren Shah & Anr. ...Respondents

Shri. Prakash Naik for the Petitioner.
Shri. Anil Agarwal for the Respondent No.1.
Ms M. H. Mhatre, A.P.P. for the Respondent No.2.

CORAM : A. S. OKA, J.
DATE : AUGUST 30, 2005.

P.C.:

1. Heard the Advocate appearing for the Petitioner, the Advocate appearing for the Respondent No.1 and the learned A.P.P. for the State.

2. The Petition is filed by the original complainant in a private complaint filed under section 138 of the Negotiable Instruments Act, 1881. The challenge in this Petition is to the order dated 25th April, 2005 passed by the learned Magistrate by which an Application made by the Petitioner under section 311 of the Code of Criminal Procedure,1973 (hereinafter referred to as the said Code) for recalling P.W.1 and for production of documents has been rejected.

3. The learned Advocate for the Petitioner has invited my attention to the various averments made in the Application made by the Petitioner. Placing reliance on the decision of the Apex Court reported 1999 Supreme Court Cases (Cri) 1062 (Rajendra Prasad

Vs. Narcotic Cell), the learned Advocate appearing for the Petitioner submitted that by Application under section 311 of the said Code, there is no attempt to fill in the lacuna. He submitted that failure to produce the documents which are sought to be produced by the Petitioner cannot be termed as inherent weakness in the prosecution case. He submitted that opportunity may be given to the Petitioner by allowing Application under section 311 of the said Code.

4. The learned Counsel appearing for the Respondent No.1 pointed out that the complaint has been filed in the year 1996 and has been repeatedly adjourned. He pointed out that after recording of evidence on the side of the defence was completed on 06th April, 2005, the arguments were concluded by the advocates appearing for the parties and the complaint was adjourned to 07th April, 2005 for the limited purposes of re-joinder by the advocate for the Petitioner. He pointed out that instead of proceeding with the re-joinder, the Petitioner filed an Application under section 311 of the said Code with the only object of filling up the lacuna in the prosecution case. He submitted that the learned Trial Judge was right in rejecting the Application. He has also invited my attention to the notes of the evidence and pointed out that no attempt was made by the P.W.1 to prove the relevant part of Sauda Book. He placed

reliance on the decision of this Court reported in 2001 Criminal Law Journal 450 (B.G. Goel Vs. Ebrahim Haji Husen Sanghani & Ors.).

5. According to the case of the Petitioner, there was a sale transaction between the Respondent No.2 and the Petitioner. On account of liability in the said transaction, a cheque was issued by the Respondent No.1 in favour of the Petitioner which was dishonoured. On the basis of the said cheque, a complaint has been filed by the Petitioner. It will be necessary to refer to the material averments in paragraph Nos.3 to 5 of the Application under section 311 of the said Code reads thus:

> 3. The arguments on behalf of the complainants were heard on 02nd April, 2005 and thereafter the accused engaged his Counsel Shri. Anil Agarwal to make submissions on his behalf. It is submitted that during the course of argument the accused contended that the issuance of contract note for the transaction in shares was mandatory. The accused tried to dispute the genuineness of transaction mentioned in Ex.'P-3' (invoice) on account of absence of the respective contract note and computerised records of National Stock Exchange (NSE). Thus, the accused tried to dispute his liability for the issuance of cheque on account of non-production of the said contract note and records of NSE.
>
> 4. So also, during the said argument of the Ld. Counsel for the accused, it was contended that sauda book was not produced by the complainant whereas the fact of the matter is that sauda book was indeed produced before this Hon'ble Court

> as recorded in the evidene of P.W.1 No.1 but because it consisted of thousands of pages of computerized chronological transactions, this Hon'ble Court noted the production of the same but did not retain either the originals or the photocopies, even of the relevant transactions.
>
> 5. It is submitted that in view of the said contentions the P.W. No.1 made laborious efforts to find out and trace the relevant contract notes, recods of NSE pertaining to the said transactions by checking in all the records for the year 1995, and the 1995 Bye Laws, Rules and Regulations of the NSE. The P.W. No.1 has found out the office copies of the said contract notes and records and Bye Laws concerning the transactions in the above case. The complainant therefore desires to produce on record an tender in evidence the office copies of the said contract notes, transaction records and 1995 Bye Laws of NSE by recalling P.W.No.1 and by re-examining herself.

Thus, permission is sought for production of contract notes, transaction records and 1995 Bye Laws, Rules and Regulations of National Stock Exchange (N.S.E). At this stage, it will be necessary to refer to the decision of the Apex Court in the case of Rajendra Prasad. In paragraph No.8 the Apex Court has held as under:

> 8. **Lacuna in the prosecution must be understood as the inherent weakness of a latent wedge in the matrix of the prosecution case.** The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. **No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material**

> **was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.**(Emphasis supplied)

It must be noted that during the course of arguments, the learned Advocate appearing for the Respondent No.1 fairly stated that the Petitioner can always produce the certified copy of bye laws of National Stock Exchange which can be read in evidence.

6. The question which arises is whether the Petitioner can be permitted to produce the contract notes and transaction records and whether the Petitioner can be permitted to recall P.W.1. It is to be recorded here that Advocate for the Petitioner stated that the Petitoner is not seeking recall of any other witness save and except P.W.1. In so far as contract notes are concerned, it cannot be said that there is no foundation made by the Petitioner to allow the production thereof. Allowing the production of contract notes will not amount to allowing the Petitioner to fill in any lacuna. Considering the assertions made in the complaint, failure to produce the contract notes cannot be treated as an inherent lacuna in the case of the Petitioner. The Petitioner has used vague term "transaction records". There are

no material particulars in the Application made by the Petitioner for showing as to what constitutes this " transaction records". On the basis of such vague assertion, the Petitioner cannot be permitted to produce any document pertaining the transaction in question. In my view, permission cannot be granted to the Petitioner to produce what is described as "transaction records". For proving the contract notes, it will be necessary to recall the P.W.1. In the circumstances, this Petition deserves to be allowed in part.

7. Hence, I pass the following order:

: O R D E R :

i) The impugned judgment and order dated 25th April, 2005 is quashed and set aside.

ii) The Petitioner is permitted to produce the contract notes and certified copies of Bye Laws, Rules and Regulations of National Stock Exchange. The Petitioner is also permitted to recall the P.W.No.1 for leading evidence only on the contract notes which are allowed to be produced.

iii) It will be open for the Respondent No.1 to lead further evidence for dealing with the additional

evidence allowed to be produced by the Petitioner. It will be open for the Respondent No.1 to cross-examine the P.W.1 and to recall the other prosecution witnesses and to cross-examine the said witnesses on the contract notes.

iv) All questions on merits of the complaint are kept open.

v) Rule is made partly absolute in the above terms with no orders as to costs.

vi) Parties are directed to appear before the Trial Court on 12th September, 2005 at 11.00 a.m.

vii) Parties to act upon an authenticated copy of this order.

JUDGE